IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
S.B. Criminal Appeal No.237/2001

Ramswaroop Jaiswal S/o Shri Kanhaiyalal
Versus
State of Rajasthan through P.P.

Date of Judgment :::: 12th February, 2007

PRESENT
Hon'ble Mr. Justice Narendra Kumar Jain

Shri Karanpal Singh, Counsel for accused-appellant
Shri S.L. Songara, Amicus Curiae
Shri Arun Sharma, P.P., for the State
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//Reportable//

By the Court:-

Accused Ramswaroop Jaiswal Son of shri Kanhaiyalal has preferred this appeal under Section 374 (2) of the Code of Criminal Procedure, against the judgment and order dated 12th of March, 2001, passed by the Special Judge, Narcotic Drugs and Psychotropic Substances Act Cases, Jaipur, in Sessions Case No.24/98, whereby the accused-appellant was convicted and sentenced under Section 8/20 (b) (ii) of the Narcotic Drugs and Psychotropic Substances Act (for short, the NDPS Act') to ten years rigorous imprisonment and a fine

of Rs.1,00,000/-, in default of payment of fine to further undergo two years simple imprisonment.

Briefly stated the facts of the case are that PW-1 Ganga Singh, Additional Superintendent of Police, received an information on 27th of October, 1998, at 4.05 P.M. from one informer to the effect that two persons along-with Scooter No.RJ-14-21M-0942 are standing at a temple near assembly and they are having 'charas' with them. On receipt of this information, he proceeded for the site along-with the CI Surendra Singh, SI Abdul Rehman, SI Mohammad Faiyaz, ASI Jagdev Singh, FC Dharam Singh and FC Shabir Khan. Two witnesses were called. PW-1 Ganga Singh gave a written joint notice to accused Ramswaroop and Banwari Lal for their search before a Magistrate or otherwise to be made by him. The consent of the accused was taken on the notice Exhibit P-3. Thereafter search of accused was made in presence of PW-1. The contraband weighing 250 gram 'Charas' was recovered from the right-pants-pocket of accused Banwari Lal, which was seized vide seizure-memo Exhibit P-4. Thereafter search of accused Ramswaroop was made and from his clothes two keys of Bajaj Scooter were recovered. The dickey of scooter was opened and one polythene bag was

recovered wherein 250 gram 'Charas' was found. The said contraband, recovered from the scooter of accused Ramswaroop, was seized vide recovery-memo Exhibit P-5. The samples of contraband weighing 50 gram were taken from each packet recovered from both the accused and both were marked 'A-1' and 'A-2'. The remaining contraband was sealed separately and the same were also marked as 'A' and 'B'. The accused persons were arrested vide arrest-memos Exhibit P-6 and Exhibit P-7. The site-plan was prepared. The FIR No.259/98 was registered at Police Station Vidhan Sabha, Jaipur City, under Section 8/21 of the Act. The samples of contraband were sent for chemical examination. As per the report of the FSL dated 7.5.1999 (Exhibit P-23) it was opined that, on microscopic and chemical examination, the sample contained in each of the packet marked 'A-1' and 'B-1' was found to be of 'CHARAS'. After completion of investigation, the police filed a challan against both the accused persons.

The learned trial court framed charge against accused-persons under Section 8/20 of the Act. The accused-persons denied the charge and claimed to be tried. The prosecution examined 17 witnesses and also produced documentary evidence Exhibit P-1 to

Exhibit P-25. Thereafter the statement of the accused-persons were recorded under Section 313 Cr.P.C., wherein they stated that the prosecution evidence is false. No evidence was adduced in defence.

The learned trial court, after considering the oral and documentary evidence as well as the submissions made on behalf of both the parties, acquitted co-accused Banwari Lal Sharma on the ground that notice (Exhibit P-3) was defective as no option, required under Section 50 of the NDPS Act, was given to him and it was a personal search as the contraband was recovered from his pants-pocket, therefore, there is violation of mandatory provisions of Section 50 of the Act and consequently acquitted him. So far as the present appellant is concerned, it was observed that the contraband was not recovered from his person but it was recovered from his Scooter, therefore, Section 50 of the NDPS Act is not applicable and he cannot be acquitted of the charge levelled against him, on the ground of defective notice under Section 50 of the NDPS Act and consequently convicted and sentenced the accused-appellant, as mentioned above.

The learned counsel for the appellant, Shri S.L. Songara, contended that the so-called information received by PW-1 Ganga Singh was not reduced-in-writing as required by Section 42 of the NDPS Act and non-recording of information has prejudiced the case of the accused and the same is fatal to the prosecution case. He further contended that there was variance in weight of the samples of contraband taken and sent to FSL. Vide seizure-memo (Exhibit P-5), the sample of 50 grams 'Charas' was taken, whereas, as per the FSL report (Exhibit P-23) the weight of the packet, marked 'B-1', was only 40.4 grams. He, therefore, contended that looking to the variance of 9.6 grams in the sample taken and sent to FSL shows that the same sample, which was taken from the seized-article, was not sent to FSL for chemical examination and the prosecution has failed to explain the said variance in weight of the sample satisfactorily, which creates serious doubt on the prosecution case.

He further contended that there were two independent witnesses in the case, namely, PW-8 Om Prakash Saini and PW-9 Kamal Saini and both were declared hostile, therefore, the conviction cannot be based solely on the testimony of police

witnesses, particularly when there are serious discrepancies in the present matter.

It is further contended that the recovery of 2 keys of scooter from the pants-pocket of the accused is also personal search within the meaning of Section 50 of the NDPS Act, therefore, the provisions of Section 50 are attracted in the present case and the learned trial court has committed an illegality in not giving the same benefit which was extended to co-accused Banwari Lal.

He lastly contended that in case the appellant does not succeed on merits than at-least his sentence of imprisonment be reduced to a period of six years imprisonment already undergone by him. It is contended that the accused remained in jail for about one month during trial and, after his conviction by the trial court, he has already undergone the sentence of imprisonment of about five years and eleven months till date, therefore, he has completed the sentence of imprisonment of about six years and he should be given the benefit of amendment made in the Act with effect from 2nd of October, 2001. He contended that vide Notification

dated 19th of October, 2001, issued in exercise of powers conferred by Clause (viia) and (xiiia) of Section 2 of the NDPS Act, the small and commercial quantity of contrabands have been notified and as per this Notification the 'small quantity' of the contraband 'Charas' has been notified as 100 grams and commercial quantity thereof has been notified as one kilogram, whereas in the present case 250 grams 'charas' was recovered from the Scooter. He contended that the accused may be given the benefit of amendment considering the fact that the quantity of the contraband recovered from the possession of the accused in the present case was lesser than the commercial quantity and, as such, he deserves the benefit of reduction of sentence, because if an accused is found with contraband of lesser than the commercial quantity then no minimum sentence of imprisonment is provided after amendment of 2001. The accused-appellant has already remained in custody for nearly about six years, therefore, his sentence of imprisonment may be reduced to a period of imprisonment already undergone by him.

The learned Public Prosecutor supported the judgment and order passed by the learned trial court and contended that all the submissions made on

behalf of the accused are not tenable in the eye of law in the facts and circumstances of the present case. He contended that recovery of contraband was made from the scooter belonging to the accused, therefore, it cannot be treated as personal search and the provisions of Section 50 of the NDPS Act are not attracted and the case of the present accused is distinguishable from the case of co-accused Banwari Lal, who has been acquitted by the trial court. He also contended that variance in weighment of sample of contraband taken and sent to FSL for chemical examination, is concerned, the same is immaterial and not tatal, therefore, the appellant is not entitled to any benefit of doubt of it. It is further contended that accused is not entitled to the benefit of amendment made in the NDPS Act with effect from 2nd October, 2001, as the judgment of the trial court was passed much before the date of amendment and the amendment is not applicable on pending appeals.

I have considered the rival submissions of learned counsel for both the parties and examined the impugned judgment as well as the record of the trial court.

In Bahadur Singh Vs. State of Madhya Pradesh and Another – JT 2001 (10) SC 231, the Hon'ble Apex Court, in the facts and circumstances of that case and particularly in view of the serious discrepancies in the recovery, seizure and deposit of articles in the 'maalkhana', held that the appellant cannot be convicted on the sole testimony of the police witnesses. Para 8 of the judgment reads as under:-

> "8. Under the aforesaid circumstances, the appellant cannot be convicted on the sole testimony of police witness, PW-3. The question of applicability of section 35 of the Act will not arise in the present case when the recovery itself is doubtful. The appellant had disputed the recovery of contraband. There are serious discrepancies in its recovery, seizure and deposit in the maalkhana. The prosecution has thus failed to prove its case beyond all reasonable doubts against the appellant who is accordingly entitled to benefit of doubt."

In Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat – AIR 2000 SC 821, the Hon'ble Supreme Court considered the effect of non-recording of information received from the informer, and held as under:-

"18-19. Learned counsel for the State of Gujarat thereupon contended that as the appellant did not dispute the factum of recovery of the "Charas" from the vehicle it does not matter that the information was not recorded at the first instance by the police officer. We cannot approve the contention because non-recording of information has in fact deprived the appellant as well as the Court of the material to ascertain what was the precise information which PW-2 got before proceeding to stop the vehicle. Value of such an information, which was the earliest in point of time, for ascertaining the extent of the involvement of the appellant in the offence, was of a high degree. A criminal Court cannot normally afford to be ignorant of such a valuable information. It is not enough that PW-2 was able to recollect from memory, when he was examined in Court after the lapse of a long time, as to what information he got before he proceeded to the scene. Even otherwise, the information which PW-2, in this case, recollected itself tends to exculpate the appellant rather than inculpate him.

20. ....
21. ....
22. ....

23. In this case non-recording of the vital information collected by the police at the first instance can be counted as a circumstance in favour of the appellant. Next is that even the information which PW-2 recollected from memory is capable of helping the accused

> because it indicates that the real culprits would have utilized the services of an auto-rickshaw driver to transport the gunny bags and it is not necessary that the auto-rickshaw driver should have been told in advance that the gunny bags contained such offensive substance. The possibility is just the other way around that the said culprits would not have disclosed that information to the auto-rickshaw driver unless it is shown that he had entered into a criminal conspiracy with the other main culprits to transport the contraband. Prosecution did not adduce any evidence to show any such connivance between the appellants and the real culprits. There is nothing even to suggest that those culprits and the appellant were close to each other, or even known to each other earlier. Yet another circumstance discernible from the evidence in this case is that the police had actually arrayed two other persons as the real culprits and made all endeavour to arrest them, but they absconded themselves and escaped from the reach of the police."

In Ritesh Chakarvarti Vs. State of Madhya Pradesh – 2000 (VIII) AD (S.C.) 533, the Hon'ble Apex Court held as under:-

> "26. It was submitted that although PWs 1 and 2 were declared hostile, their signatures on the seizure documents had not been

disbelieved. They categorically stated that their signature were obtained on blank papers and they were not witnesses to seizure. On the face of such statements made by the said witnesses, it was all the more necessary to examine all the departmental witnesses.

27. .....
28. .....
29. .....

30. Furthermore, why PW-6 who was a part of the raiding party did not corroborate the statement of PW-5 is again a matter which raises a serious doubt about the veracity of the prosecution case.

31. .....

32. In Jagdish Vs. State of M.P. {(2003) 9 SCC 159}, a Three-Judge Bench of this Court set aside a judgment of conviction where independent witnesses denied that search and seizure for recovery of opium took place in their presence. An adverse inference was further drawn as to why PW-1 Narcotic Sub-Inspector therein brought down only one passenger from the bus if he did not have any prior information or entertain any suspicion regarding involvement of Appellant therein being in possession or smuggling of opium.

33. In Bhola Ram Kushwaha Vs. State of M.P. {(2001) 1 SCC 35}, this Court although opined that only because witnesses have turned hostile, Appellant would be entitled to a judgment of acquittal as a matter of right but having regard to the

> statements of prosecution witnesses inter alia to the effect that the police had called the witnesses in a police station and obtained their signatures on the paper and the statements of the independent witnesses that the accused was never interrogated and searched in their presence, the judgment of conviction and sentence was set aside.
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> 34. .....
> 35. .....
> 36. .....
> 37. .....
> 38. .....
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> 39. In a case of this nature, the Court will move cautiously in view of the grave nature of the offence.
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> 40. For the reasons aforementioned, we are of the opinion that appellant is entitled to benefit of doubt. The appeal is allowed. He is directed to be set at liberty unless wanted in any other case."

In Pappu Son of Shri Gulab Chand Vs. State of Rajasthan – 2006 (3) W.L.C. (Raj.) 609, this Court considered the effect of variance in weighment of sample taken and sent to FSL and held as under:-

> 10. In Rajesh Jagdamba Avasthi Vs. State of Goa, (2005) 9 SCC 773, the Hon'ble Supreme Court also considered the effect of variance in weighment of sample seized and sent to FSL for examination and held that in absence of explanation about this

discrepancy, it renders the case of the prosecution doubtful. The Hon'ble Supreme Court observed as under:-

> "We do not find it possible to uphold this finding of the High Court. The appellant was charged of having been found in possession of charas weighing 180.70 gm. The charas recovered from him was packed and sealed in two envelopes. When the said envelopes were opened in the laboratory by the junior scientific Officer, PW 1, he found the quantity to be different. While in one envelope the difference was only minimal, in the other the difference in weight was significant. The High Court itself found that it could not be described as a mere minor discrepancy. Learned counsel rightly submitted before us that the High Court was not justified in upholding the conviction of the appellant on the basis of what was recovered only from envelope A ignoring the quantity of charas found in envelope B. This is because there was only one search and seizure, and whatever was recovered from the appellant was packed in two envelopes. The credibility of the recovery proceeding is considerably eroded if it is found that the quantity actually found by PW 1 was less than the quantity sealed and sent to him. As he rightly emphasized, the question was not how much was seized, but whether there was an actual

> seizure, and whether what was seized was really sent for chemical analysis to PW 1. The prosecution has not been able to explain this discrepancy and, therefore, it renders the case of the prosecution doubtful."

11. So far as the facts of present case are concerned it is clear from Exhibit P-3, the recovery and seizure memo, that two samples of 50 gram each were taken and this recovery memo has been proved by the prosecution. The forwarding letter to the Forensic Science Laboratory has not been placed on the record. There is no evidence that seal which was used in sealing the sample was sealed and the same was sent to FSL along with the samples. The analysis report dated 8.8.1997 sent by the State Forensic Science Laboratory, Rajasthan, Jaipur (Exhibit P-12), makes it clear that the sample weighing 43 gram was received in the Laboratory for chemical examination. Therefore, it cannot be said that the same sample, which was seized in the case, was sent for chemical examination and thus this discrepancy has prejudiced the case of the accused appellant. The report dated 8.8.1997 does not confirm that the seal used at the time of seizure of contraband and sample, was sent along with the sample. Therefore the submission of the learned counsel for the accused appellant is fully covered by the judgment of the Hon'ble Supreme Court in Rajesh Jagdamba Avasthi's case (supra), and accused-appellant is entitled to get the benefit of doubt.

Exhibit P-1 is the letter dated 27th of October, 1998, written by PW-1 Ganga Singh, Additional Superintendent of Police (Crimes), Jaipur City, Jaipur, to Superintendent of Police (South), Jaipur City, informing that he received a secret information on 27.10.1998 at 4.05 PM from one informer that Ramswaroop Jaiswal and Banwari Lal are standing with their Scooter and they are in possession of 'charas' and waiting for customers to sell it. Therefore, the information is being sent. Exhibit P-2 is the letter written by PW-1 Ganga Singh, Additional Superintendent of Police, to the witnesses Kamal Saini and Om Prakash Saini to witness the proceeding, and both the witnesses agreed for the same. Exhibit P-3 is the joint notice given by PW-1 to both the accused Ramswaroop Jaiswal as well as Banwari Lal, wherein it is stated that they are to be searched as there is an information of their possessing contraband 'Charas' and if they want, a Magistrate can be called for their search, otherwise search will be made by him. The accused-persons gave their consent that they have no objection if search is made by him i.e. PW-1, and there is no need to call a Magistrate for this purpose. Exhibit P-5 is the seizure-memo of 250 gram 'Charas' recovered from the scooter belonging to the

accused appellant Ramswaroop. From the seizure-memo (Exhibit P-5) it reveals that a sample of contraband weighing fifty gram was taken and marked 'B-1' and remaining contraband weighing 200 gram was sealed and that packet was marked 'B'. The scooter of Bajaj Super brand, bearing Registration No.RJ 14 21M 0942, was seized vide seizure-memo (Exhibit P-11). Exhibit P-17 is the photo-stat copy of the registration certificate of the scooter wherein name of registered owner is mentioned as Ramswaroop S/o Kanhaiyalal. Exhibit P-23 is the report of the Public Analyst.

PW-1 Ganga Singh has admitted in his statement that the secret information received by him from informer was not reduced in writing. Exhibit P-1 is the letter which was forwarded by him to his superior forwarding the information received by him. He also admitted that he used the seal of Abdul Rehman. He also admitted that no separate notice was given to each accused, but Exhibit P-3 is the notice which was given to both the accused. He also admitted that he did not mention in Exhibit P-3 that he is a Gazetted Officer. From Exhibit P-3 it is clear that only they were informed that if they (suspect) want - a Magistrate can be called for

their search, otherwise he (PW-1) will take their search. It is not mentioned in Exhibit P-3 that alternatively their search can be made before a Gazetted Officer as required under Section 50 of the NDPS Act. PW-1 has also admitted that he did not prepare memo of specimen seal at the spot. He also admitted that he did not seize any document relating to scooter.

PW-2 Shabir Khan has admitted that he did not see the information given by the informer. He further admitted that the seal, which was used at the time of seizure, was belonging to the Additional Superintendent of Police and the same was given by him to the In-charge, Police Station, which was further sealed by the S.H.O.

From the prosecution evidence it reveals that there is no dispute about the secret information received by Ganga Singh (PW-1) that it was not reduced in writing. The effect of non-recording of information has been considered by the Hon'ble Apex Court in the case of Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat (Supra) and case of accused has been prejudiced by it. There is contradiction about seal used at the time of taking sample and sealing

the packets whether it was belonging to Ganga Singh, PW-1, or Abdul Rehman. It is also not in dispute that sample weighing 50 gram each was taken from both the packets and as per the report of FSL the weighment of sample packets was found as 42.1 gram and 40.4 grams. The sample relating to accused-appellant was marked 'B-1' and its weight was mentioned as 40.4 grams. It is also not in dispute that both the independent witnesses PW-8 Om Prakash Saini and PW-9 Kamal Saini were declared hostile during trial by the prosecution. Non-recording of information has prejudiced the case of the appellant as neither any identification mark of the accused was available with PW-1 nor their names were known to him. It is also not borne out from the prosecution evidence that the informer went with PW-1 to identify accused-persons and accused-persons arrested were the same for whom the information was given. So far as not giving of option vide notice Exhibit P-3 is concerned, it reveals that the recovery of contraband was made from the scooter, therefore, Section 50 of the NDPS Act may not be attracted in the case but it would have been fair and reasonable for PW-1 to apprise the accused-appellant to that extent that he (PW-1) is a Gazetted Officer. All these discrepancies, as

mentioned above, creates serious doubt on the prosecution case and the accused becomes entitled to the benefit of doubt. The learned trial court has not appreciated the prosecution evidence correctly and hence wrongly convicted and sentenced the accused-appellant. After re-appreciation of the prosecution evidence this court is satisfied that the prosecution has failed to prove the case against the accused-appellant beyond all reasonable doubts and the accused is entitled to get the benefit of doubt.

Consequently, the appeal is allowed. The conviction and sentence passed by the trial court is set aside. The accused is in custody, therefore, he may be released forthwith if his custody is not required in any other case.

(Narendra Kumar Jain) J.

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